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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 825

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

BRIEF OF JAMES R. CARDWELL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6), and is set forth in full in the appendix hereto. It also appears (Rec. pp. 125-132).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1, of this court. Contrary to the rules

of this court, petitioner annexed to his petition a copy of the second opinion of the Illinois Appellate Court. Petitioner has not furnished an index to the record of the Illinois Supreme Court.

There was an adequate and independent non-federal ground of decision to support the judgment of the state Supreme Court. The advent of bankruptcy *ipso facto*, occuring more than four months after the entry of the decrees sought to be attacked, collaterally, solely on the ground of an alleged error of law (Rec. 27), in no wise affected the vadility of such decrees. The sole issue sought to be raised in the trustee in bankruptcy's bill of review was whether, making particular reference to Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29; 129) the trial court in the creditor's suit committed an error of law in entering the decrees it entered in that case. No contention was made in any state court that the bankruptcy act was repugnant to the particular Illinois statute involved. The state Supreme Court affirmed the decree of the trial court dismissing for want of equity not only the complaint for review of the trustee in bankruptcy but also the counterclaim for review of Mrs. Huszagh filed in the identical suit; and the gist of its decision was that if there were any error of law committed by the state trial court in entering the decrees in the creditor's suit, a bill of review would not lie at the instance of the trustee in bankruptcy nor at the instance of the judgment debtor, because such decrees were entered more than four months prior to bankruptcy, and pursuant to an agreement made between Mrs. Huszagh (the former judgment debtor) and Cardwell (the former judgment creditor), which, as stated in the opinion of the state Supreme Court, "related to matters in which they were both competent to contract and resulted in the decrees entered by the trial court, becoming consent decrees" (Rec. 132).

The construction which the Illinois Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised

Statutes (Rec. 130) related to the interpretation of an Illinois statute in regard to which the federal court would follow the state Supreme Court. The gravamen of the decision was to the effect that a consent decree made, as stated in the state Supreme Court's opinion (Rec. 132) between "parties competent to contract" and in regard to which "Cardwell could not be placed in *statu quo*" (Rec. 132) made the attacked decree *res adjudicata* more than four months prior to the advent of bankruptcy and Mrs. Huszagh, or anyone claiming thru her, after the lapse of more than four months was estopped (Rec. 132) from seeking to attack collaterally the consent decrees solely on the ground of an alleged error of law. Whether the decrees were consent decrees was a question of fact found by the trial court and confirmed by the Illinois Supreme Court, in regard to which this court does not grant certiorari to review.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

As a further ground for showing that this court lacks jurisdiction, it should be noted that the petitioner filed three petitions for certiorari, Cases No. 823, 824 and 825. He only has served counsel for James R. Cardwell with a single copy of only one petition and a single copy of the record which bore all three case numbers on it. No order consolidating the three petitions has been entered, and the service of only one copy does not comply with the jurisdictional requirement of service of a copy of petition for certiorari on counsel for the respondent within ten days from the filing of each of such petitions in this court. In the absence of an order of consolidation in this court, each petition for certiorari stands as a separate case on its own merit as far as meeting the jurisdictional requirements of this court, including the matter of serving counsel for the respondents, is concerned.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of the Matter Involved" is incorrect, incomplete and misleading.

On October 11, 1939, James R. Cardwell, a judgment creditor, filed in the Circuit Court of Lake County, Illinois, his creditor's bill (Rec. 5) making Dorothea W. Huszgah and Fred J. Wegg, as trustee under the last will and testament of Frederick H. Wickett, deceased, parties defendant thereto. In the pleadings filed in the creditor's bill suit, no mention was made of Section 49 of Chapter 22 of the Illinois Revised Statutes, which protects certain types of interests in active trusts created by another in good faith for continuing support of the beneficiary from being subjected to the payment of the debts of the beneficiary by any proceeding at law or in equity brought by a creditor. Dorothea W. Huszagh, in her answer (Rec. 15-17) to the creditor's bill, as a defense to the same alleged that the trust created by her late father's will was a spendthrift trust and as such was not subject to be taken for the payment of any judgment against her thru a creditor's bill. The court heard evidence but no transcript of evidence was preserved in the creditor's bill suit, the preservation of such evidence was not necessary under the Illinois law to sustain the validity of the decree.

On November 17, 1939, the state Circuit Court in the creditor's suit entered a decree of sale in which it was specifically found and decreed (Rec. 17-18) that the court had jurisdiction over the parties and the subject matter; that the trust in question was not a spendthrift trust and it was subject to be sold at public vendue to pay the judgment of Cardwell. The state statute cited (Sec. 49 of Chap. 22 Ill. Rev. Stat.) purports to protect only the interest of a beneficiary in a trust estate created in good faith by another. It is always a question of fact, shown by the evidence, whether the trust was created in good faith, and

on collateral attack in a bill of review the state court is not privileged to determine what evidence another court heard or did not hear. There was no proof in the bill of review case as to whether Mrs. Huszagh had contributed to the trust in question.

Seven days after the entry of the decree of sale in the creditor's suit and during term time of the court, Dorothea W. Huszagh made and entered into an agreement with Cardwell, in respect to which the Supreme Court of the State of Illinois in its opinion (Rec. 131-132) said:

> "Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a

spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

24. It appears clear to this Court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees."

After the making of this agreement, the Circuit Court by agreement of the parties entered its decree approving the master's report of sale (Rec. 84).

Ten months after the entry of the decrees mentioned, Mrs. Huszagh filed her voluntary petition in bankruptcy (Rec. 17; Rec. 4) and, thereafter, the petitioner filed his bill of review in the Circuit Court of Lake County, seeking to set aside the decree of sale and the decree approving the master's report of sale in the creditor's bill suit, on the ground that such decrees were entered erroneously because Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29) provided that an interest in a trust estate created in good faith by someone other than the beneficiary could not be taken and sold by any judicial process for the payment of a debt of the beneficiary (Rec. 28-29; 131).

The trial court dismissed the complaint filed by the petitioner and also the counterclaim for review filed by Mrs. Huszagh for want of equity, holding, as a matter of fact and of law, that by reason of the agreement which Mrs. Huszagh made and entered into with Cardwell the decrees sought to be attacked became consent decrees and that, furthermore, since Mrs. Huszagh for a valuable consideration had agreed not to take any steps to litigate further the subject matter of the creditor's bill suit or the decree of sale, by appeal, bill of review or otherwise; and since Cardwell could not be placed in *statu quo,* Mrs. Huszagh was estopped more than four months prior to the advent

of bankruptcy from attacking said decrees. Since Mrs. Huszagh for more than four months before bankruptcy had been estopped from attacking said decrees, her trustee in bankruptcy did not have any greater rights to attack (on the sole ground of a mistake of law) the decrees, than Mrs. Huszagh had four months prior to bankruptcy. In other words, the event of bankruptcy did not *ipso facto* recreate rights which had been bargained away in good faith and for a valuable consideration more than four months before bankruptcy.

The trial court in the bill of review case (Rec. 66) found that in the creditor's bill suit the court had jurisdiction over the parties and the subject matter of such decree, and the Supreme Court of Illinois in its opinion, confirmed the finding of the trial court, stating:

> "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust." (Rec. 132.)

NOTE: Since the petitioner did not attach a copy of the opinion of the Supreme Court to his petition, as is required by the rules of this court, this respondent has attached a copy of such opinion as an appendix to his brief for the convenience of the court.

THE QUESTIONS PRESENTED.

Although a variety of questions might be regarded as incidentally involved in the decision of the Illinois Supreme Court, that decision does not basically involve more than one question of fact in respect to which the testimony in the bill of review case was undisputed, namely, did Mrs. Huszagh and Cardwell within term time make and enter into an agreement whereby, for a valuable consideration, Mrs. Huszagh agreed not to litigate any further the matters involved in the creditor's bill suit, and by reason thereof the decrees in the creditor's bill case became consent decrees and whereby Mrs. Huszagh, more than four

months prior to the advent of bankruptcy, already was estopped from filing any bill of review or otherwise attacking the decrees in question.

As a matter of Illinois law, this respondent contends that the decrees in the creditor's suit were valid and not subject to any collateral attack, independently of the making of the agreement between Cardwell and Mrs. Huszagh; because the validity of the creditor's bill suit on a collateral attack does not depend upon technical correctness of any pleadings in such suit but upon the evidence heard and considered by the trial court in the creditor's suit (*Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 176), which was not preserved and which, if it was preserved, could not be considered on a collateral attack; and because the unknown evidence in the creditor's suit might have indicated that Mrs. Huszagh had contributed to the trust in question and then, under the Illinois authorities, she would not be entitled to the protection of Section 49 of Chapter 22 of the Illinois Revised Statutes. (*Requa* v. *Graham*, 187 Ill. 67.) Furthermore, her failure to plead or interpose the defense of that statute precluded her from attacking the decrees of the trial court upon the ground of the error claimed by her trustee in bankruptcy.

At the time of the entry of the decrees in the creditor's bill suit sought to be attacked collaterally, no question of bankruptcy law was involved. Mrs. Huszagh did not file her petition in bankruptcy until ten months later (Rec. 4; 27-28.) The validity of the decrees attacked collaterally by a bill of review involved solely a question of state law, as that law was at the time of the entry of the decrees attacked.

The construction which the state Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised Statutes was a matter of state law decided by a state court ten months before the advent of bankruptcy, and it did not involve the determination of any question of bankrupcy law.

PROPOSITIONS OF LAW.

I.

A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys, in case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

Harding v. *Harding*, 198 U. S. 317, citing 11 Ill. 540.

Bergman v. *Rhodes*, 334 Ill. 137.

Crow v. *Harrison*, 248 Ill. 462.

King v. *King*, 215 Ill. 100, 115, 119 (did not challenge jurisdiction of court below cannot raise the same on appeal).

Armstrong v. *Cooper*, 11 Ill. 540.

Harrigan v. *County of Peoria*, 262 Ill. 36.

II.

In a case where no question of public policy is involved, and the parties are competent to contract, regarding the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it can make no difference whether the decree is erroneous or even void for want of jurisdiction, for the defendant is, nevertheless, bound by his agreement not to attack its validity.

Bergman v. *Rhodes*, 334 Ill. 137.

King v. *King*, 215 Ill. 100.

Smucker v. *Larimore*, 21 Ill. 267.

Corwin v. *Shoup*, 76 Ill. 246 (minor accepting proceeds of a void sale on becoming of age is estopped to prosecute writ of error).

Trapp v. *Off*, 194 Ill. 287.
Hudnall v. *Ham*, 183 Ill. 486.
Hempstead v. *Broad*, 282 Ill. 524.
Bonney v. *Lamb*, 210 Ill. 75, 98.

III.

The Supreme Court of the United States of America does not grant the writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts in a case where the trial court and the Supreme Court of the State of Illinois have concurred in their findings to the effect that the decrees sought to be attacked collaterally were consent decrees.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States of America v. *Johnston*, 268 U. S. 220, 227.

IV.

Since the protection, if any, afforded the defendant in a creditor's suit by Section 49 of Chapter 22, Illinois Revised Statutes, may be waived by the defendant and is waived if not asserted when opportunity is afforded, there was no error of law committed by the court in entering the decree in the creditor's suit.

Binns v. *La Forge*, 191 Ill. 598 (creditor's suit).
Wright v. *Dunning*, 46 Ill. 271, at 275 (foreclosure).
The People v. *Fisher*, 340 Ill. 250, at 261.
Harrigan v. *County of Peoria*, 262 Ill. 36.
Hunsley v. *Aull*, 387 Ill. 520, at 523.

V.

Section 49 of the Illinois Chancery Act (Chap. 22, Ill. Rev. Stat.) does not protect a trust which ostensibly proceeds from some person other than the defendant, if, in fact, the defendant directly or indirectly contributed any part of the trust fund, either at the time of its creation or subsequently thereto, and it is always a question of fact whether such defendant did contribute, which need not appear merely from the pleadings in the case, and such question of fact cannot be tried de novo by a bill of review.

Re Qua v. *Graham*, 187 Ill. 67.
Linn v. *Dowling*, 216 Ill. 64.
Harrigan v. *County of Peoria*, 262 Ill. 36.

VI.

A decree in a non-bankruptcy court predicated on the validity of a lien arising more than four months before bankruptcy is res adjudicata in a subsequent suit commenced by the trustee in bankruptcy.

Blair v. *Brailey*, 221 Fed. 1, 4. (Cir. Ct. of Appeals, 5th Circuit—cert. denied 238 U. S. 638.)

VII.

The trial court in reviewing its former decree, on hearing a bill of review for alleged error of law apparent on the record, where the former decree recites that testimony was heard, has no jurisdiction to make a ruling on the effect of going to trial in the case under review without a reply on file. The effect of going to trial without a reply on file cannot be determined from an examination of the pleadings alone, but depends upon the proceed-

ings had and evidence heard upon the trial of the case under review, which is outside of the scope of review allowable either by the trial court reviewing its former decree or the Appellate Court or Supreme Court on appeal in such case.

Knaus v. *Chicago Title & Trust Co.*, 265 Ill. 588, 592-3.

Chap. 110, Par. 164 Ill. Practice Act, Bar Association Edition, 1943 (Specifically provides that the penalty of admission does not apply where "the party has had no opportunity to deny").

Rule 8 of the Illinois Supreme Court gives 20 days to answer and such time had not expired.

Piot v. *Davis*, 241 Ill. 434, 439 (Rule where case was heard on pleadings and evidence).

Dempsey v. *Burns*, 281 Ill. 644.

Kelly v. *Kelly*, 285 Ill. 72, 75.

Guerin v. *Guerin*, 270 Ill. 239, 244.

Imperial Fire Insurance Co. v. *Schimmer*, 96 Ill. 580.

VIII.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes "establishes a rule of property and not of procedure only" (Rec. 131).

Potter v. *Couch*, 141 U. S. 296, 312.

Spindle v. *Shreve*, 111 U. S. 542.

Baumgarten v. *Reconstruction Finance Corp.*, 131 F. (2d) 741.

Hummel v. *Cardwell*, 390 Ill. 526 (*the case at bar*).

Dunham v. *Kaufman*, 385 Ill. 79.

Nichols v. *Levy*, 72 U. S. (5 Wall.) 433.

Knight v. *Gregory*, 389 Ill. 554, 561.

Hull v. *Farmers Loan & Trust Co.*, 245 U. S. 312.

Eaton v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427.

IX.

The interests of the parties in the case at bar are of such a nature that the court of bankruptcy does not have summary jurisdiction and, therefore, the trustee in bankruptcy had his day in court when he filed his plenary suit in the Illinois court.

Cline v. *Kaplan,* 323 U. S. 97.
In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

X.

Section 70a of the Bankruptcy Act does not define exemptions or property rights. By its express terms no substantive rights or special remedies are created in favor of the trustee in bankruptcy changing the character of the property which, by virtue of the express terms of an Illinois statute (not mere judicial decision regarding the common law), is not available to be taken in payment of a debt by any judicial process.

Hull v. *Farmers L. & T. Co.,* 245 U. S. 312.
Eaton v. *Boston Safe Deposit Co.,* 240 U. S. 427.
Potter v. *Couch,* 141 U. S. 296, 319.
Spindle, Assignee v. *Shreve,* 111 U. S. 542.
Southern Dairies, Inc. v. *Banks,* 92 F. (2d) 282 (certiorari denied 302 U. S. 761).
Steele v. *Buel,* 104 Fed. 968 (Cir. Ct. of App. 8th Circuit 1900).
Holden v. *Stratton,* 198 U. S. 202.
Turner v. *Bovee,* 92 F. (2d) 791, 792.
Lockwood v. *Exchange Bank,* 190 U. S. 294.

SUMMARY OF ARGUMENT.

1. The petitioner by his bill of review sought to attack collaterally, solely on the ground of alleged error of state law, two consent decrees (not subject to be reviewed by a bill of review), which had become *res adjudicata* more than 4 months prior to bankruptcy.

2. Whether the decrees sought to be attacked collaterally were consent decrees was a question of fact, and the finding of the state trial court, confirmed by the state Supreme Court, will not be reviewed by certiorari by this court.

3. Aside from the question of consent decrees, a bona fide agreement made for a valuable consideration respecting a subject matter in regard to which the parties were competent to contract, wherein the parties agreed to settle and compromise their litigation, fully executed more than 4 months prior to bankruptcy, estops both parties to such agreement, and the petitioner claiming through one party, from maintaining his bill of review.

4. A state court decree, which became *res adjudicata* more than 4 months prior to bankruptcy, is not affected by the provisions of Section 70a of the bankruptcy act in case where such decree is sought to be attacked by the petitioner solely on the ground that the court entering the decree committed an alleged error of state law.

5. No question of bankruptcy law was necessarily involved in the decision of the state Supreme Court, which construes the effect of a state statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) making the interest of a beneficiary in a trust created in good faith by another for the support of the beneficiary just as immune from the

claim of creditors as an interest in a so-called typical spendthrift trust.

6. There was no error of law committed by the trial court in entering the decrees sought to be attacked collaterally.

7. No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved.

8. No question of federal law or any important question of law is here involved.

ARGUMENT.

I.

A. A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys in a case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

B. Consent that the decrees shall stand and be enforced, given by the defendant to the plaintiff for a valuable consideration, within term time, makes the decrees consent decrees, in regard to which under the Illinois law no bill of review will lie.

The petitioner contends that the interest of Dorothea W. Huszagh in the trust estate created by her father's will could be assigned by her and, therefore, her right, if she had any, to attack the consent decrees passed to the petitioner.

Upon the same premise that such interest could be assigned, such interest was a subject matter which both the Illinois trial court (Rec. 66, 98) and the Illinois Supreme Court in its opinion (Rec. 132) properly found was of such a character "that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract."

Upon the premise that Mrs. Huszagh could have assigned her beneficial interest in the trust estate, Mrs. Huszagh could make a bargain with Cardwell, which she did make, relating to her interest, providing that the decree for the sale of her interest stand and be carried out by a sale at public auction. If at such sale the interest brought

more than the amount due Cardwell on his judgment, the overplus would have been given to Mrs. Huszagh. The fact that at the public sale there was no overplus is immaterial. Cardwell agreed (Rec. 131-132), regardless of what price the interest brought at the master's sale, to satisfy in full his common law judgment entered against Mrs. Huszagh in another case, to pay master's fees, which he did, in the sum of $200.00 and all expenses and costs in the creditor's suit, and agreed to file a satisfaction piece in the common law suit.

In case where the parties are competent to contract respecting the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it makes no difference whether the decree is erroneous or even void for want of jurisdiction, because the defendant, nevertheless, is bound by his agreement not to attack its validity. (*Hempstead* v. *Broad,* 275 Ill. 358, 365; *Corwin* v. *Shoup,* 76 Ill. 246; *Bergman* v. *Rhodes,* 334 Ill. 137; *King* v. *King,* 215 Ill. 100.)

Since more than four months elapsed from the time of the entry of the consent decrees sought to be attacked collaterally and the advent of bankruptcy, the decrees sought to be attacked had become *res adjudicata* more than four months prior to bankruptcy. There is no provision in the bankruptcy act which gives the trustee in bankruptcy rights to attack and set aside decrees on the sole ground of a mistake of law which, according to the laws of the State of Illinois, have become *res adjudicata* between the parties more than four months prior to the advent of bankruptcy.

There is no question of fraud involved in this case (Rec. 87). The sole ground upon which the trustee in bankruptcy sought to attack the decrees by his bill of

review was on the ground of mistake of law (Rec. 27; 129), but a consent decree, entered more than four months prior to the advent of bankruptcy, cannot be set aside because of any error of law in entering such decree, either by a party to such decree or by his trustee in bankruptcy. (*Harding* v. *Harding*, 198 U. S. 317, citing *Armstrong* v. *Cooper*, 11 Ill. 540; *Crow* v. *Harrison*, 248 Ill. 462.)

A bill of review does not lie to set aside a consent decree on the ground of an error of law.

Petitioner contends in his petition that the sale held pursuant to the decrees entered in the creditor's bill suit transferred to Cardwell legal title to the beneficial interest of Mrs. Huszagh in the trust estate created by her father's will. The decree of the trial court ordering the sale in the creditor's suit, and the decree of the trial court in that suit approving the sale, the force and effect of the undisputed agreement made between Cardwell and Mrs. Huszagh, and the Master's public sale and assignment were effective for the purpose of transferring to Cardwell the interest of Mrs. Huszagh in the trust estate created by her father's will, because both the bill of review of the trustee in bankruptcy and the counterclaim for review of Mrs. Huszagh were dismissed for want of equity by the decree of the trial court in the bill of review suit, which was affirmed by the judgment of the state Supreme Court.

The transfer of Mrs. Huszagh's interest, however, was fully effectuated through the consent decrees entered ten months before the advent of bankruptcy, and such decrees, by virtue of the agreement between Cardwell and Mrs. Huszagh, were not subject to be set aside by a bill of review after having been entered. However, it appears that the trustee in bankruptcy makes the contention that because "title to Mrs. Huszagh's interest" passed to Cardwell by proceedings had in the creditor's bill suit, there

was a transfer of Mrs. Huszagh's beneficial interest in the trust within the purview of Section 70a(6) of the bankruptcy act relating to "the unlawful taking or detention of or injury to his property." To contend that a valid consent decree entered ten months before bankruptcy is an unlawful taking is a misnomer and begs the question. Such a contention concedes that in the creditor's suit the court had jurisdiction over the parties and the subject matter of its decree, as was found by both the trial court (Rec. 66) and by the state Supreme Court in its opinion (Rec. 132) otherwise there would be no "taking" as the petitioner alleges. The validity of a consent decree was confirmed by the judgment of the state Supreme Court. Its validity depended upon what was the law of the State of Illinois at the time the decrees sought to be attacked were entered and when Mrs. Huszagh made her agreement with Cardwell. At that time there was no bankruptcy, and no question of bankruptcy law was involved. Reviewing such decrees at a later date, more than four months after their entry, does not involve any proper question of bankruptcy law.

The state Supreme Court, construing Section 49 of the Illinois Chancery Act (Chap. 22 of the Illinois Revised Statutes 1945) relied upon by the plaintiff in his bill of review as sole ground for showing that there was an error of law in entering the decree in the creditor's suit, determinined only what was the proper construction of the state statute law at the time the consent decrees were entered. The state Supreme Court, in construing the Illinois statute relied upon, held that upon the facts in the case, as found by the trial court and confirmed by the state Supreme Court, no bill of review would lie. Such a determination of fact and state statute law is not subject to be reviewed by certiorari by this court. Whether such decrees should be set aside by a bill of review was solely a question of state law. If the decrees were subject to be

set aside by a bill of review although they were consent decrees and although Mrs. Huszagh made her agreement with Cardwell, then the Supreme Court would have provided in its judgment that relief be given to either the trustee in bankruptcy on his bill of review or to Mrs. Huszagh, on her counterclaim for review. Its actual decision in the case was that no bill of review would lie at the instance of Mrs. Huszagh or at the instance of the trustee in bankruptcy, and the rationale of the Supreme Court's decision was that the decrees sought to be attacked, being consent decrees, were at no time subject to be set aside by a bill of review on the ground of a mere error of law by Mrs. Huszagh. After the lapse of four months, the trustee in bankruptcy could claim only that the "rights" of Mrs. Huszagh "passed" to him. However, since Mrs. Huszagh had no right to maintain a bill of review, there was no right which "passed" to her trustee in bankruptcy on the advent of bankruptcy, irrespective of the fact whether Mrs. Huszagh's interest would have passed to the trustee in bankruptcy if there had been no creditor's bill proceedings and if there had been no agreement between her and Cardwell. Having decided in the negative the first question as to whether Mrs. Huszagh at any time had a right to maintain a bill of review to set aside a consent decree in the creditor's suit, because of an alleged error at law, the opinion of the Supreme Court of Illinois dealing with the second question, as to whether or not the trustee in bankruptcy would have had a right to maintain a bill of review to set aside the decrees in the creditor's suit if Mrs. Huszagh had not made the agreement she made with Cardwell, was a moot question not necessarily involved in this case and constituted mere dictum. By claiming that Mrs. Huszagh's "right" to maintain a bill of review "passed" to him by virtue of Section 70a(5) or 70a(6) of the bankruptcy act, the petitioner begs the question. He claims that he can set aside consent decrees

because a "right" to set them aside "passed" from a bankrupt by virtue of the bankruptcy act in case where at the advent of bankruptcy and more than four months prior thereto the bankrupt had no right to set aside the consent decrees for alleged error of law. This being the status of the attacked decrees more than four months before bankruptcy, there could not have been an unlawful taking within the meaning of Section 70a(6) of the bankruptcy act by virtue of a decree which was found and adjudicated by the Supreme Court of Illinois, at a time it had jurisdiction over the parties and the subject matter in the bill of review case, to be lawful and not subject to be set aside.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes were enacted as a matter of public policy for the benefit of a beneficiary in a trust estate but have never been construed to hold that in a creditor's bill, with the consent of the beneficiary, such property could not be sold to pay a debt. In the case of *Binns* v. *LaForge,* 191 Ill. 598, the Supreme Court affirmed a decree of the trial court which subjected the interest of a beneficiary in a trust, within the purview of the statute cited, to the payment of a debt, because the beneficiary did not take an appeal. The Illinois Supreme Court would not in the case last cited have affirmed the decree of the trial court if it were of the opinion that the trial court had no jurisdiction to enter the decree it did enter. When the Supreme Court affirms a decree of the trial court, it can no longer be contended that the trial court entering such decree did not have jurisdiction over the parties and the subject matter of its decree.

The trustee in bankruptcy, at various times, and even in his argument in the petition filed in this court, has tried to treat matters in the bill of review case as if he were trying the creditor's bill suit *de novo,* with a right

to interpose defenses on behalf of Mrs. Huszagh or on his own behalf, which were not interposed in the creditor's suit. He has purposely failed to mention in his summary statement of facts or argument the very salient and controlling feature of the state Supreme Court decision to the effect that the decrees sought to be attacked collaterally were consent decrees, and has not enlightened this court as to the controlling fact that Cardwell and Mrs. Huszagh, for a valuable consideration, made and entered into an agreement more than ten months before bankruptcy, wherein Mrs. Huszagh agreed not to litigate further, and, in particular, not to take any appeal or file any bill of review in respect to the decree of sale in the creditor's suit.

Contrary to the rules of this court, the petitioner has adopted the novel and unwarranted expediency of attaching as appendix to his petition, not a copy of the opinion of the Illinois Supreme Court but the second opinion of the Illinois Appellate Court, although his petition herein is not and could not be directed to the judgment of the Appellate Court, reversed, as it was, by the judgment of the Illinois Supreme Court.

II.

Whether the decrees in the creditor's suit sought to be attacked collaterally by a bill of review were consent decrees is a question of fact which will not be reviewed on certiorari by the Supreme Court of the United States.

The Circuit Court of Lake County, Illinois, found and adjudicated (Rec. 66-67) that the decrees sought to be attacked were consent decrees and that, for a valuable consideration, Mrs. Huszagh had agreed with Cardwell that she would not file any bill of review or take any further steps to litigate the validity of the decrees sought to be attacked by the trustee in bankruptcy. The bona fides of

such agreement is not in issue (Rec. 87) but is conceded in this case where the validity of the decrees is sought to be attacked collaterally only on the ground of an error of law (Rec. 27-29; 129). Whether the decrees were consent decrees is a matter of fact, and the finding of the trial court, concurred in by the Supreme Court of Illinois, makes such fact final, because the Supreme Court of the United States does not grant a writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts. (*Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.) Furthermore, the evidence in the bill of review case (Rec. 81-89), showing that the decrees were consent decrees is undisputed.

III.

Section 70a of the Bankruptcy Act does not define exemptions or create property rights in derogation of the express terms of the Illinois statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) pertaining to the interest of a beneficiary in a trust estate created in good faith for support of someone other than the beneficiary.

It is the contention of the trustee in bankruptcy that even in the absence of fraud or mistake of fact, he has some special standing and privilege in a plenary bill of review suit in a court of Illinois to attack decrees which became *res adjudicata* more than four months prior to bankruptcy, which the bankrupt would not have if bankruptcy had not intervened. There is no language in Section 70a of the bankruptcy act which could be construed to create such special remedy or discrimination in favor of a trustee in bankruptcy.

The Supreme Court of Illinois was right in holding, as a matter of *obiter dicta* that in a plenary suit a trustee in bankruptcy has no right to take an interest in property which, by virtue of an express statute (Section 49 of

Chapter 22) of the State of Illinois, as construed by not only the Supreme Court of that state but as repeatedly construed by the Supreme Court of the United States, creates a rule of property and renders property of the specific character falling within the purview of the statute immune from claims of all creditors. Property so immune from claims of all creditors would not have passed to the trustee in bankruptcy if there had not been any proceedings in the creditor's bill suit. This holding by the Illinois Supreme Court was not necessary to its decision, which rested solely, as appears from the dismissal of Mrs. Huszagh's counterclaim for review, upon the ground that the decrees were consent decrees entered more than four months prior to bankruptcy.

The dictum of the Supreme Court to the effect that the trustee in bankruptcy had no right to recover and administer as a part of the assets of the bankrupt's estate any portion of the principal or income from the trust estate created by the last will of Mrs. Huszagh's father, was not the basis of its judgment.

However, the dictum of the Illinois Supreme Court was based upon its own construction of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be regarded as if it were read into every trust made since the passage of that statute in 1845. Such statute gives a particular character to the interest of a beneficiary in a trust estate, that is within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, also known as Section 49 of the Illinois Chancery Act, and creates a rule of property. (*Potter* v. *Couch*, 141 U. S. 296, 312.) Such interest is as immune from the beneficiary's debts as is an interest in a typical spendthrift trust.

In the case of *Steib* v. *Whitehead*, 111 Ill. 247, where the interest of a beneficiary in a typical spendthrift trust was involved, the Supreme Court of Illinois held that funds

in the hands of the trustee could not be attached by creditors.

In the case of *Knight* v. *Gregory,* 389 Ill. 554, at page 561 of its opinion, the Illinois Supreme Court stated:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead,* 111 Ill. 247. With these authorities and others of a similar nature cited by appellants we agree. These authorities are, however, concerned only with an interpretation of the rights of creditors seeking redress against funds in the hands of a trustee under either a spendthrift trust or an active trust qualifying under Section 49 of the Chancery Act."

In *Potter* v. *Couch,* 141 U. S. 296, at page 320 of its opinion, the Supreme Court of the United States in speaking of the Illinois statute stated:

> "the spirit of the statute alike require that this equitable interest should not be charged for his debts."

and that the Illinois statute

> "establishes a rule of property, and not of procedure only."

In *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, the court had under consideration a trust established by a will, in which will it was provided that the income shall be free from interference of creditors. In Illinois, Section 49 of Chapter 22 of the Illinois Revised Statutes, had been in force and effect in its present form since the year 1845, and it has repeatedly been construed as creating a rule of property. Every will creating a trust, bona fidely created by one person for the benefit of another, must be read to the same extent and in like manner as if specific reference to the statute mentioned had been made in the will. With this fact in mind, the case at bar, as far as the contentions of the

petitioner are concerned, is similar to the case of *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, in which the Supreme Court stated in its opinion:

> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it."

Since the petitioner contends that he was entitled to maintain his bill of review only because of the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, he must be bound by the construction placed on that statute by the Supreme Court of Illinois. The United States Supreme Court will follow the decisions of the Illinois Supreme Court construing an Illinois statute. In the case of *Page* v. *Edmunds,* 187 U. S. 596, at page 602, the United States Supreme Court stated:

> "If those decisions are interpretations of the state statute, we must yield to their authority."

No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved. No question of federal law or any important question of law is here involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

DWIGHT S. BOBB,
Attorney for the Respondent,
James R. Cardwell.

OSCAR S. SEAVER,
Of Counsel.